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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 **IN RE: BARD IVC FILTERS**
10 **PRODUCTS LIABILITY LITIGATION**

MDL No. 15-2641 PHX DGC

11 **This Order Relates to: All Actions**
12

13 This dispute concerns documents withheld from discovery under the attorney-
14 client privilege and the work-product doctrine by Defendants C.R. Bard, Inc. and Bard
15 Peripheral Vascular, Inc. (“Bard”). Plaintiffs challenge a substantial number of
16 documents on Bard’s privilege log. Plaintiffs sampled 307 documents on the log, which
17 represents five percent of the total. After meeting and conferring, the parties reached
18 agreement on all but 133 of the sampled documents. The resolution of this discovery
19 dispute will be used to guide the parties as they attempt to resolve the overall privilege
20 dispute in this multi-district litigation (“MDL”).

21 On March 25, 2016, Plaintiffs moved to compel production of the 133 disputed
22 documents. Doc. 1214. On March 31, 2016, the Court held a third case management
23 conference where the issue was discussed (Doc. 1246), and the Court provided additional
24 guidance in the ensuing case management order (Doc. 1319 at 5-6). The issues have now
25 been fully briefed (Docs. 1476, 1590, 1976, 2219, 2222), and the Court heard oral
26 arguments on June 21, 2016. The Court has also reviewed the representative sample
27 documents submitted by the parties. For the following reasons, the Court will grant in
28 part and deny in part Plaintiffs’ motion to compel.

I. Choice of Law.

The parties agree that the work-product doctrine is governed by federal law, but disagree on which law should govern the attorney-client privilege. The parties' briefing suggests four possibilities: (1) generally applicable common law, (2) Arizona law, (3) New Jersey law, or (4) the law of each transferor district.

A. Choice of Law Approaches.

Federal Rule of Evidence 501 provides that "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. "Rule 501, however, does not tell us which state law the forum state should apply." *KL Grp. v. Case, Kay & Lynch*, 829 F.2d 909, 918 (9th Cir. 1987). Commentators have suggested several methods of resolving this choice-of-law issue: (1) use the privilege law of the state whose substantive law provides the rule of decision; (2) apply the privilege law of the state in which the federal court sits; or (3) apply the conflict-of-law doctrine of the state in which the federal court sits. *Id.* (citing 23 C. Wright & K. Graham, Jr., *Federal Practice and Procedure* § 5435, at 865-69 (1980); 2 Weinstein's *Federal Evidence* § 501[02] (1986)).

The issue is complicated in the MDL context, where cases originate in many different states. In *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, MDL No. 2100, 2011 WL 1375011, at *1 (S.D. Ill. Apr. 12, 2011), the court addressed a privilege challenge to 330 documents, a representative sample of the 12,857 documents withheld as privileged. Consistent with Rule 501, the Court found that "privilege matters that are relevant to an element of a claim or defense for which state law supplies the rule of decision will be governed by state privilege law." *Id.* at *7. The court recognized that "a federal court sitting in diversity applies the choice of law rules emanating from the state in which it sits," and that, in the MDL context, "the transferee court applies the choice of law rules of the state in which the transferor court sits." *Id.* at *4. After surveying the choice of law principles of every state, the court decided to apply the "most significant relationship" test found in Restatement (Second) of

1 Conflict of Laws § 139 (Am. Law Inst. 1971). The court found that in most states, “the
 2 law of the state with the most significant relationship to the communication will govern
 3 the existence and scope of attorney-client privilege.” *Id.* at *9.¹

4 Other cases have adopted different approaches. *See In re Vioxx Prods. Liab.*
 5 *Litig.*, MDL No. 1657, 501 F. Supp. 2d 789, 791-92 (E.D. La. 2007) (applying generally-
 6 known principles of the attorney-client privilege); *In re Baycol Prods. Litig.*, MDL No.
 7 1431, 2003 WL 22023449, at *1-2 (D. Minn. Mar. 21, 2003) (applying the choice-of-law
 8 rules of the state where the transferee court sits); *U.S. Surety Co. v. Stevens Family Ltd.*,
 9 No. 11-C-7480, 2014 WL 902893, at *1 (N.D. Ill. Mar. 7, 2014) (applying the privilege
 10 law of state that supplies the substantive rule of decision).

11 After considering these various approaches, the Court agrees with *Yasmin*, which
 12 looked to the transferor states’ choice of law rules to determine which privilege law to
 13 apply. This approach comports with the Supreme Court’s instruction that federal courts
 14 should look to state conflict laws as well as substantive laws. *See Klaxon Co. v. Stentor*
 15 *Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496-97 (1941). The Court also agrees with *Yasmin*’s
 16 selection of the Restatement’s most significant relationship test as best representative of
 17 the choice of law rules applied by the various states. 2011 WL 1375011, at *7. The
 18 parties also agree. Docs. 1476 at 6; 1590 at 2. Thus, the Court will use Restatement
 19 § 139 to identify the privilege law to be applied in this case.

20 **B. Section 139 Analysis.**

21 Part 1 of § 139 provides: “Evidence that is not privileged under the local law of
 22 the state which has the most significant relationship with the communication will be
 23 admitted, even though it would be privileged under the local law of the forum, unless the
 24 admission of such evidence would be contrary to the strong public policy of the forum.”

25
 26 ¹ The court also concluded that cases filed directly in the MDL pursuant to its
 27 direct-filing order should be treated “as if they were transferred from a judicial district
 28 sitting in the state where the case originated.” 2011 WL 1375011, at *5-6. This
 approach comports with the fourth case management order in this MDL. *See* Doc. 1485
 at 3-4. Thus, directly-filed cases in this MDL will be treated as if they were transferred
 from the forum where the case otherwise would have been filed – typically, the state
 where the plaintiff resides or where the Bard filter was implanted.

1 Restatement (Second) of Conflict of Laws § 139 (Am. Law Inst. 1971). Part 2 provides:
2 “Evidence that is privileged under the local law of the state which has the most
3 significant relationship with the communication but which is not privileged under the
4 local law of the forum will be admitted unless there is some special reason why the forum
5 policy favoring admission should not be given effect.” *Id.* Thus, § 139 applies only
6 when the privilege law of the forum differs from that of the state with the most significant
7 relationship to the allegedly privileged communication.

8 To determine which state has the most significant relationship, Comment e to
9 § 139 provides this guidance:

10 The state which has the most significant relationship with a communication
11 will usually be the state where the communication took place, which, as
12 used in the rule of this Section, is the state where an oral interchange
13 between persons occurred, where a written statement was received or where
14 an inspection was made of a person or thing. . . . The state where the
15 communication took place will be the state of most significant relationship
16 in situations where there was no prior relationship between the parties to
17 the communication. If there was such a prior relationship between the
18 parties, the state of most significant relationship will be that where the
19 relationship was centered unless the state where the communication took
20 place has substantial contacts with the parties and the transaction.

21 *Id.*

22 In the case of written communications (the only kind of communication at issue in
23 this order), the comment suggests that the state where the communication was “received”
24 has the most significant relationship. This suggestion, made by the ALI in 1971, is
25 problematic in a day of electronic communications. Email communications – which
26 represent most of the communication at issue in this motion – usually go back and forth
27 between the communicating parties several times in a single email string, resulting in
28 virtually everyone being the “receiving” party for at least some of the communications.
Email communications can also be “received” by many people in many states
simultaneously. Thus, it may be impossible to determine which party “received” the
communication. Commentators have noted this difficulty with the Comment e approach.

1 See Graham C. Lilly & Molly Bishop Shadel, *When Privilege Fails: Interstate Litigation*
2 *and the Erosion of Privilege Law*, 66 Ark. L. Rev. 613, 643 (2013) (“determining the
3 state with the ‘most significant relationship’ may prove problematic with electronic
4 communication”).

5 This case provides an apt example. The first communication at issue in this
6 motion (Log 2, Control 809) is just over one page long, and yet it includes an initial email
7 between two people on July 15, 2005; a response copied to three more people on July 17,
8 2005; a forwarding of the email to still another person on July 18, 2005; and a response
9 from the recipient of the forwarded email that is addressed to five new individuals and
10 copied to one new individual, in addition to those already in the email chain. Three
11 communications, among a total of 12 people, over the course of four days render it
12 virtually impossible to determine where this communication was “received.” To make
13 matters more difficult, the parties have not provided the Court with the roles and
14 locations of many of the people on this email, and this is just one of dozens the Court
15 must review. Many of the documents at issue in this motion include the same kind of
16 back-and-forth among many persons over the course of several days.

17 The Court concludes that it would make little sense to find that the state with the
18 most significant relationship – and therefore the applicable privilege law – varies from
19 email to email, or maybe even within a single email string, depending on whom happens
20 to be copied and whom the Court deems to be the primary recipient. The Court finds that
21 the “received” test for written email communication is simply not workable in this case.²

22 The Court need not dwell longer on this issue, however, because the other part of
23 Comment e suggests that if the parties to the communication in question had a prior
24 relationship, then the state where that relationship was “centered” will usually be the state
25 with the most significant relationship. This approach provides a workable solution for
26 this case. The communications in question appear primarily to be among Bard in-house

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28 ² The Court notes that Comment e says the place where the written communication
is received will “usually” be the state with the most significant relationship, leaving room
for other approaches.

1 lawyers, based at C.R. Bard headquarters in New Jersey, and managers and employees of
 2 Bard Peripheral Vascular (“BPV”), located in Arizona. The subject of this litigation is
 3 the design and performance of filters made and sold by BPV, as well as the marketing
 4 and compliance efforts of BPV. Thus, although lawyers and paralegals for Bard may be
 5 based in New Jersey, it appears their client for purposes of these communications, as well
 6 as the subject of their communications, is primarily BPV and its activities in Arizona.

7 This appearance is confirmed by the evidence. BPV is a wholly-owned subsidiary
 8 of C.R. Bard. Doc. 2219-1 at 2, ¶ 3. BPV is headquartered in Arizona, *id.*, and “is the
 9 company that was and is primarily responsible for all activities related to” the filters at
 10 issue in this case, *id.*, ¶ 4.

11 From its headquarters in Tempe, Arizona, [BPV] had and continues to have
 12 principal responsibility in designing the filters, testing the filters, directing
 13 the manufacturing of the filters, developing contents of the instructions for
 14 use that accompanies the filters, communicating with the FDA regarding
 15 the filters, developing marketing material for the filters, training the sales
 16 force regarding interacting with physicians about [the] filters, developing
 17 written communications to physicians related to the filters, developing and
 maintaining a quality and post-market surveillance system regarding the
 filters, and deciding when each new generation of filter is first marketed
 and the previous filter stops being marketed.

18 *Id.*, ¶ 5. BPV is responsible for managing its own day-to-day operations. Doc. 2219-2 at
 19 3-4. C.R. Bard is responsible for setting “corporate quality standards or guidance[] that
 20 the divisions would need to follow at a global level,” *id.* at 4, but the divisions act as
 21 “their own business that reports back up to Bard corporate or C.R. Bard,” *id.* at 5. C.R.
 22 Bard’s legal department acts as “a full functioning legal department” covering “[a]ll
 23 matters of legal breadth,” and the legal work for BPV. *Id.* at 6.

24 Given these facts, and the reality that lawyers advise clients on the clients’
 25 activities and issues, not the lawyers’ activities and issue, the Court concludes both that
 26 there was a preexisting relationship between the Bard in-house lawyers and BPV, and
 27 that the relationship can most accurately be described as “centered” in Arizona. That is
 28 where products are developed, marketing materials are written, FDA communications

originate, training occurs, testing is done, and legal advice is needed, received, and acted upon.

The authors of the law review article cited above reach a similar conclusion. They note that “[s]ince privileges primarily benefit their holders – such as a client or patient – identifying the holder should be an important indication of which state has the most significant relationship to the communication.” Lilly & Shadel, 66 Ark. L. Rev. at 649. The privilege holder’s “affiliation with competing states is of paramount importance” and “should be a primary factor in determining which state has the most significant relationship to a communication.” *Id.*

The Court concludes that the preexisting relationship between the parties to the communications at issue in this case was centered in Arizona, and that Arizona therefore has the most significant relationship to the communications.³ As a result, the Court will apply the privilege law of Arizona. Because Arizona also is the forum where this Court is located, the Court need not further apply the conflict resolution principles set forth in parts 1 and 2 of § 139.⁴

C. Plaintiffs’ Arguments.

Plaintiffs argue that New Jersey is the state with the most significant relationship to the communications, but the evidence does not support this conclusion. It is true that C.R. Bard’s corporate center, including its legal department, is located in New Jersey.

³ Comment e says the state of the preexisting relationship controls “unless the state where the communication took place has substantial contacts with the parties and the transaction.” Restatement § 139, cmt. e. Because the state where the communication took place is so difficult to identify given the nature of the electronic communications at issue, the Court does not view this part of the comment as helpful or controlling.

⁴ The Court notes that if the Court adopted Plaintiffs’ argument that New Jersey has the most significant relationship, and if New Jersey privilege law provided that a particular communication was not privileged, the Court likely would nonetheless apply Arizona law if it would hold the communication privileged. Section 139(1) provides that the forum’s law governs if admission of the evidence in question would be contrary to the strong public policy of the forum. The Court views A.R.S. § 12-2234 – the Arizona statute that governs the corporate attorney-client privilege – as a strong public policy. The statute was passed by the Arizona Legislature and signed by the Governor in response to an Arizona Supreme Court decision that weakened the corporate privilege, and has remained unchanged for more than 20 years. *See Roman Catholic Diocese of Phx. v. Super. Ct.*, 62 P.3d 970, 974 (Ariz. Ct. App. 2003).

1 But the evidence shows that C.R. Bard was not involved in the management of day-to-
2 day operations of BPV and, as discussed above, virtually all of the relevant conduct and
3 events occurred at BPV. The fact that Bard's legal department is located in New Jersey
4 is not dispositive, particularly when the relevant client, BPV, is located in Arizona.

5 Plaintiffs argue that "in the intra-corporate context, the parent and wholly-owned
6 subsidiary should be treated as one entity." Doc. 2222 at 4. Plaintiff cite *Teleglobe*
7 *Communications Corp. v. BCE Inc.*, 493 F.3d 345 (3d Cir. 2007), but that case addressed
8 the effect of disclosing an otherwise privileged attorney-parent communication to the
9 parent's subsidiary, *see id.* at 369-74. It did not address the complicated choice-of-law
10 issue presented in this case.

11 Plaintiffs argue that "it is reasonable to presume that Bard's lawyers relied on New
12 Jersey law" when advising BPV. Doc. 2222 at 4-5. The Court does not agree. Plaintiffs'
13 own cases suggest that lawyers typically apply the laws of their client's state when
14 providing guidance. *See, e.g., Compuware Corp. v. Moody's Investors Servs., Inc.*, 222
15 F.R.D. 124, 133 (E.D. Mich. 2004) (holding that New York company's lawyers advising
16 on privilege "surely relied on the protections of New York law").

17 Plaintiffs assert that Bard's litigation counsel never mentioned Arizona law in the
18 parties' meet and confer process, involving "claims going back several years" in related
19 cases. Doc. 2222 at 5. While this may support an estoppel argument, which Plaintiffs
20 have not made, it does not address the choice of law issue.

21 Plaintiffs assert that Bard "is hardly a major employer in Arizona" and that BPV
22 "does not specifically market in Arizona, has no retail locations here, and some of its
23 products including IVC filters are manufactured elsewhere." Doc. 2222 at 5. But
24 Plaintiffs do not dispute that BPV is an Arizona corporation with its principal place of
25 business here. The relevant question is not the significance of BPV's presence in
26 Arizona, but where the relationship between BPV and its lawyers was centered. For
27 reasons discussed above, the Court concludes that the relationship was centered in
28 Arizona, the location of the activities for which the legal advice was provided.

II. Legal Standard.

A. Attorney-Client Privilege.

The attorney-client privilege “is rigorously guarded to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.” *State v. Sucharew*, 66 P.3d 59, 64, ¶ 10 (Ariz. Ct. App. 2003) (citing *State v. Towery*, 920 P.2d 290, 299 n.6 (Ariz. 1996) (internal quotation marks omitted)). “The privilege belongs to the client and encompasses communication between the attorney and client made in the course of the attorney’s professional employment.” *Id.* (citing *State v. Holsinger*, 601 P.2d 1054, 1058 (Ariz. 1979)). “The burden of showing the relationship, the confidential character of the communication, and other necessary facts, is that of the party claiming the privilege.” *State v. Sands*, 700 P.2d 1369, 1374 (Ariz. Ct. App. 1985) (citation omitted).

In Arizona, the corporate attorney-client privilege is codified at A.R.S. § 12-2234:

- A. In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney’s paralegal, assistant, secretary, stenographer or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity.
- B. For purposes of subsection A, any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:
 1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.
 2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.
- C. The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.

1 “Based on its express terms, the statute protects from disclosure communications between
 2 a corporation’s attorney – or his ‘paralegal, assistant, secretary, stenographer or clerk’ –
 3 and ‘any employee, agent or member of the entity or employer regarding acts or
 4 omissions of or information obtained from the employee agent or member’” if it is “[f]or
 5 the purpose of obtaining information in order to provide legal advice to the entity or
 6 employer or to the employee, agent or member.” *Salvation Army v. Bryson*, 273 P.3d
 7 656, 662-63 (Ariz. Ct. App. 2012) (citations omitted).

8 **B. Work-Product Doctrine.**

9 “Ordinarily, a party may not discover documents and tangible things that are
 10 prepared in anticipation of litigation or for trial by or for another party or its
 11 representative (including the other party’s attorney, consultant, surety, indemnitor,
 12 insurer, or agent).” Fed. R. Civ. P. 26(b)(3)(A). Courts in the Ninth Circuit use the
 13 “because of” test to determine whether dual-purpose documents were prepared in
 14 anticipation of litigation:

15 In circumstances where a document serves a dual purpose, that is, where it
 16 was not prepared exclusively for litigation, then the “because of” test is
 17 used. Dual purpose documents are deemed prepared because of litigation if
 18 in light of the nature of the document and the factual situation in the
 19 particular case, the document can be fairly said to have been prepared or
 20 obtained because of the prospect of litigation. In applying the “because of”
 21 standard, courts must consider the totality of the circumstances and
 determine whether the document was created because of anticipated
 litigation, and would not have been created in substantially similar form but
 for the prospect of litigation.

22 *United States v. Richey*, 632 F.3d 559, 567-68 (9th Cir. 2011) (quotation marks and
 23 citations omitted). The party invoking work-product protection bears the burden of
 24 proof. *Conoco Inc. v. U.S. Dep’t of Justice*, 687 F.2d 724, 728 (9th Cir. 1982).

25 **III. Application.**

26 The parties have identified several categories of documents that are in dispute, and
 27 have submitted for *in camera* review a binder of sample documents selected by the
 28 parties (*see* Doc. 1319) and a matrix addressing the samples. The categories have been

identified by Plaintiffs, and are described in a letter dated April 4, 2016, from Plaintiffs' counsel to Bard's counsel. *See* Doc. 1476-3. This order will follow the category numbering from the letter.

A. Category 1a.

Plaintiffs' first category involves communications "where Defendants have failed to establish [that] the communication evidences a request made to or from a lawyer for the purpose of obtaining or providing legal advice of the lawyer," specifically, "[e]ntries where non-attorney employees are alleged to have given legal advice independent of a lawyer." Doc. 1476-3 at 2. Plaintiffs make three general arguments: (1) there is no lawyer involved in the communications; (2) Bard has failed to provide facts suggesting how the matter being discussed is of legal importance; and (3) any privilege that may have attached was waived by the presence of a third party.

Arizona's corporate attorney-client privilege protects a communication by an attorney's "paralegal, assistant, secretary, stenographer or clerk" if it would otherwise be privileged. A.R.S. § 12-2234(A), (B); *see also Salvation Army*, 273 P.3d at 662-63. To be protected, a communication must be made for the purpose of providing legal advice or obtaining information to provide legal advice. A.R.S. § 12-2234(B)(1), (2). The fact that a communication includes a party's agent does not destroy the privilege. A.R.S. § 12-2234(B); *Salvation Army*, 273 P.3d at 662-63.

Bard provided an affidavit from Candace Camarata, who serves as Bard's assistant general counsel for litigation.⁵ The affidavit establishes the following. Bard's Law Department routinely provides BPV's employees with legal advice, including advice about ongoing litigation. Doc. 1476-9 at 2, ¶¶ 2-3. Bard's lawyers often utilize paralegals, referred to as either a "Litigation Manager" or a "Trademark Manager," to facilitate these communications. *Id.*, ¶ 3. Due to Bard's size, these messages must often

⁵ Plaintiffs object to the Court's reliance on Ms. Camarata's affidavit because she lacks personal knowledge of any communications to which she was not a party. The Court views Ms. Camarata's affidavit as attesting to procedures of Bard's Law Department in general, such as the general types of legal advice given and how paralegals are utilized by in-house counsel. Ms. Camarata has personal knowledge of these facts.

1 be forwarded to others within the company who need the information to perform their
2 jobs. *Id.* at 3. ¶ 7.

3 The parties have provided the Court with five Category 1a documents. Each
4 communication involves at least one Bard paralegal.

5 The first disputed Category 1a communication – Log 2, Control 809 – is an email
6 string containing four separate messages. In the first message, an employee emails a
7 litigation paralegal about a pending case. The paralegal responds, while adding
8 additional legal personnel, including another paralegal and an in-house lawyer. The
9 paralegal asks the initial author of the email to forward her message to other individuals
10 in the author’s department. The message is then forwarded twice, and a consultant is
11 copied on the final message. The consultant, Richard Bliss, is a former Bard employee
12 who worked full time at BPV in Arizona under a consulting contract, serving as Head of
13 Quality and Regulatory while Bard searched for a permanent employee to fill that
14 position. Doc. 1476-8 at 3, ¶ 5. The Court concludes that Bliss constituted an agent
15 within the meaning of § 12-2234(B). Because this email string consists of
16 communications between Bard employees or agents and a paralegal, concerning ongoing
17 litigation, the Court concludes that it falls within the protection of A.R.S. § 12-2234.
18 *Salvation Army*, 273 P.3d at 662-63 (“the statute protects from disclosure
19 communications between a corporation’s attorney – or his paralegal, assistant, secretary,
20 stenographer or clerk – and any employee, agent or member of the entity or employer . . .
21 [f]or the purpose of obtaining information in order to provide legal advice to the entity or
22 employer or to the employee, agent or member.”) (quotation marks omitted).

23 Log 6, Control 8 consists of two cells from a larger spreadsheet apparently
24 tracking specific complaints regarding Bard filters. The cells include a “comments”
25 section in which various employees make dated entries regarding facts or events related
26 to the complaint. Bard redacted two entries that reflect communications from paralegals
27 regarding litigation and investigation of a complaint. Because the redacted portions
28 contain internal communications from Bard’s legal personnel, the Court concludes that

1 they are protected by Arizona's attorney-client privilege.

2 Upon review of the other Category 1a documents – Log 6, Control 193; Log 3,
3 Control 3184; and Log 3, Control 2244 – the Court concludes that they are privileged
4 under the Arizona statute. They reflect communications to or from Bard paralegals
5 seeking information needed for legal advice. The Court therefore denies Plaintiffs'
6 motion to compel production of documents in Category 1a.

7 **B. Category 1b.**

8 Plaintiffs' second category involves communications "where Defendants have
9 failed to establish the communication evidences a request made to or from a lawyer for
10 the purpose of obtaining or providing legal advice of the lawyer," including "[e]ntries
11 where both the author and recipient are non-lawyers and Defendants" failed to provide
12 key information, such as the lawyer asked to provide legal advice, the legal purpose for
13 which the lawyer was consulted, or why disclosure to a non-lawyer was necessary to
14 fulfill that purpose. Doc. 1476-3 at 2.

15 Plaintiffs challenge the Category 1b documents on many of the same grounds as
16 the Category 1a documents. These communications all generally involve a paralegal, as
17 in Category 1a. The Court concludes that two communications – Log 3, Control 2295,
18 and Log 4, Control 29 – are privileged for the reasons discussed above in Category 1a.
19 They reflect communications to or from Bard paralegals seeking information needed for
20 legal advice. *See Salvation Army*, 273 P.3d at 662-63.

21 Defendants produced the email at Log 3, Control 3028, but not the attached
22 memorandum. The Court rejects Plaintiffs' argument that the privilege does not apply
23 because the memorandum would not "be deemed a traditionally legal document." The
24 memorandum is addressed to two Bard lawyers, and two others at BPV, and reports on
25 reviews of literature, data bases, and other sources to obtain information regarding risks
26 and complications of particular filters. It also includes a list of known risks. The
27 information contained in the memorandum clearly is of a type that lawyers would
28 consider in advising the company on legal risks, and the Court finds that the

1 memorandum is covered by Arizona's attorney-client privilege. A.R.S. § 12-2234(B).

2 Log 6, Control 191 is a communication between an ESI vendor and Bard
3 employees regarding ESI searches to be done on behalf of Bard's outside counsel in this
4 case, for witnesses that have been mentioned in motions in this case. It is a document
5 prepared in connection with ongoing litigation, and is protected work product. Fed. R.
6 Civ. P. 26(b)(3)(A). As the Court has noted in a previous order, the fact that a document
7 is prepared by non-lawyers and does not include legal advice does not mean that it was
8 not prepared in anticipation of litigation for purposes of Rule 26(b)(3)(A). Doc. 699 at 8.

9 Log 3, Control 57 contains redactions in an email chain. The Court has reviewed
10 the redacted communications. They include a request for legal advice from an in-house
11 attorney and the attorney's response, and are privileged.

12 The Court denies Plaintiffs' motion to compel as it pertains to Category 1b.

13 **C. Category 2.**

14 This category involves communications that do not show "that any legal advice
15 was given or requested. In other words, where Defendants have failed to establish that a
16 lawyer was being asked to act as a lawyer – giving advice with respect to the legal
17 implications of a proposed course of conduct." Doc. 1476-3 at 2.

18 With respect to Log 2, Control 403, the redacted portion of the email was from
19 Donna Passero, one of Bard's in-house lawyers. The redacted email language, and the
20 attachment that was withheld, include communications to and from Ms. Passero
21 regarding directions given to Bard sales representatives on statements they could or could
22 not make in their sales activities. Such communications have important legal implication
23 for Bard, and the communication is privileged.

24 Log 3, Control 1697 is a redacted email to Tom Conniff, one of Bard's in house
25 lawyers. It concerns terms of an agreement being drafted, and is privileged.

26 With respect to Log 6, Control 65, Bard states that it has previously produced the
27 cover email but not the attachment. The attachment is a spreadsheet titled "Trade
28 Complaints Tracker." It contains a number of rows and columns, including a column

1 titled “Status Summary: (Briefly Describe).” This column sometimes includes questions
 2 from specific Bard personnel, as denoted by their initials, to other individuals, also
 3 denoted by their initials. Some of the communications in this column are to or from in-
 4 house attorney Gina Dunsmuir. Bard’s arguments with respect to this document do not
 5 attempt to show that entire spreadsheet is privileged or created for a privileged purpose.
 6 The portions that reflect internal communications to or from counsel appear to be
 7 privileged, but not other portions that reflect facts such as event dates, identities of
 8 competitors, and event summaries. Nor does the Court find that descriptions of counsel’s
 9 communications with persons outside of Bard are privileged (such as event 3d, column
 10 titled “Event Summary”). If Bard has withheld the entire spreadsheet, it should produce a
 11 redacted version that redacts only those portions reflecting privileged communications.⁶

12 Log 3, Control 1694 is an email from outside counsel attaching a draft letter to
 13 opposing counsel relating to contract negotiations. The email requests feedback on the
 14 letter, and a response provides feedback. The communications are privileged.

15 Log 2, Control 741 is a communication between BPV personnel and at least two
 16 Bard lawyers, Gary Mitchell and Gina Dunsmuir. These communications involve legal
 17 advice or the obtaining of information in order to provide legal advice. They are
 18 privileged.

19 The Court concludes that the four communications in Category 2 are protected by
 20 the attorney-client privilege. The fifth document – Log 6, Control 65 – is only protected
 21 to the extent it contains communications covered by the privilege, but not otherwise, and
 22 unprivileged portions should be produced. The Court therefore grants in part and denies
 23 in part Plaintiffs’ motion to compel as it pertains to Category 2.

24 **D. Category 3.**

25 Category 3 involves “[e]ntries where a business purpose would have provided a
 26 sufficient cause for the communications.” Doc. 1476-3 at 2. For the attorney-client
 27 privilege to attach, the communication must have been for the purpose of providing legal

28 ⁶ Bard did not invoke the work-product doctrine as to this document.

1 advice or for obtaining information in order to provide legal advice. A.R.S. § 12-
2 2234(B).

3 The Court already concluded that Log 2, Control 403 is privileged. Three of the
4 remaining four communications also are clearly privileged. Log 3, Control 334 is a
5 communication redacted to remove advice received from Bard's legal department. Log
6 2, Control 794 communicates legal advice of Donna Passero, one of Bard's in-house
7 lawyers. Log 5, Control 203 conveys information to Ms. Passero, a lawyer, from Dr.
8 Richard Lehmann, Bard's consultant retained by the legal department, regarding a patient
9 death. Each of these communications involves either the relaying of legal advice or the
10 providing of information to in-house attorneys in connection with risks faced by the
11 company. A.R.S. § 12-2234(B). The attorney-client privilege applies.

12 The fifth document, Log 1, Control 115, is a communication from Dr. Lehmann, a
13 consultant retained by Bard's legal department. The Court has previously found that the
14 legal department retained Dr. Lehmann in 2004 in anticipation of litigation after Bard
15 received notice of adverse events associated with the Recovery Filter. Doc. 699 at 5.
16 The communication concerns analysis performed by Dr. Lehmann in accordance with
17 Schedule A (Doc. 335 at 9) of his contract with the legal department, and Dr. Richard
18 Holcomb, another consultant to the legal department. Because Lehman and Holcomb
19 were agents of Bard in performing this work, and the result was communicated to Bard
20 attorney Donna Passero, among other Bard personnel, the Court concludes that it is
21 privileged under the Arizona statute: "any communication is privileged between an
22 attorney for [an] . . . entity . . . and any . . . agent . . . of the entity . . . [f]or the purpose of
23 obtaining information in order to provide legal advice to the entity." A.R.S. § 12-
24 2234(B)(2).

25 The Court also finds this document protected by the work-product doctrine. As
26 noted, the Court previously held that Dr. Lehmann was retained in anticipation of
27 litigation. Doc. 699. Plaintiffs argue that this communication also had a business
28 purpose, but a dual purpose document is still protected if it "would not have been created

1 in substantially similar form but for the prospect of litigation.” *Richey*, 632 F.3d at 567-
 2 68. The Court cannot conclude that this work would have been done in substantially the
 3 same form solely for business reasons. Nor is the Court persuaded by Plaintiffs’ citation
 4 to *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 652-53 (D. Nev. 2013). The cited pages of
 5 that case concern a different email that did not include any legal counsel. *Id.*

6 The Court denies Plaintiffs’ motion to compel production of Category 3
 7 documents.

8 **E. Category 4.**

9 This category involves “[e]ntries where in-house counsel was being asked to edit
 10 or comment on non-traditional legal documents (technical, scientific, public relations,
 11 management, and marketing) versus traditional legal instruments (contracts for a study,
 12 retention of experts, patent applications).” Doc. 1476-3 at 2. Arizona courts have not
 13 directly addressed the scope of the corporate attorney-client privilege in the context of
 14 heavily-regulated industries. The Court must therefore “use its own best judgment in
 15 predicting how [the Arizona Supreme Court] would decide the case,” and, in doing so,
 16 “may be aided by looking to well-reasoned decisions from other jurisdictions.”
 17 *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir. 1980) (citations
 18 omitted).

19 In the heavily-regulated industry context, “services that initially appear to be non-
 20 legal in nature, like commenting upon and editing television ads and other promotional
 21 materials, could, in fact, be legal advice.” *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. at
 22 800. Some courts use the “primary purpose” standard, which protects communications in
 23 which lawyers provide both legal and business services if “counsel was participating in
 24 the communications primarily for the purpose of rendering legal advice or assistance.”
 25 *Id.* at 798. Other courts employ the “because of” standard, which was developed in the
 26 work-product context. *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 628 (D. Nev. 2013).
 27 Regardless of which standard is employed, the Court must conduct a document-by-
 28 document, fact-specific inquiry. *See S.G.D. Eng’g, Ltd. v. Lockheed Martin Corp.*, No.

1 CV-11-02493-PHX-DGC, 2013 WL 2297175, at *3 (D. Ariz. May 24, 2013) (adopting
2 special master's report and recommendation).

3 As an initial matter, Plaintiffs argue that several documents are not privileged
4 because they would not "be deemed a traditionally legal document." This argument is
5 not supported by Arizona's corporate attorney-client privilege, which applies broadly to
6 "any communication." A.R.S. § 12-2234(B).

7 Four of the five communications – Log 2, Control 293; Log 3, Control 1965;
8 Log 3, Control 423; and Log 4, Control 4 – were made for the primary purpose of
9 providing legal advice or assistance. Each of these communications involves a Bard
10 lawyer providing comments. Although the comments arguably serve both a business and
11 a legal purpose, they appear to be for the primary purpose of providing legal advice.
12 Log 2, Control 293, for example, involves edits by two Bard lawyers, Donna Passero and
13 Judith Reinsdorf, to a communication to the sales force. The communication concerns
14 FDA regulation and adverse events, both of which strongly implicate legal issues, as do
15 the sales force's public representations concerning such matters. Ms. Reinsdorf
16 specifically states that "[w]ith these edits, this email can serve as 'legal's approval.'" The
17 other three documents similarly involve edits of Bard's lawyers on matters implicating
18 legal issues.

19 Plaintiffs contend that Log 3, Control 1965 cannot be privileged because Bard had
20 an independent duty to produce the documents under 21 C.F.R. § 820.100 and under
21 Bard's own policies and procedures. Even if this is true, it does not lead to the
22 conclusion that Plaintiffs are entitled to communications in which Bard receives legal
23 advice in the document's preparation.

24 Log 6, Control 54 includes an email chain in which a Bard in-house attorney
25 provides comments on a letter to a doctor apparently affiliated with the Agency for
26 Health Care Research and Quality. The redacted portions of the emails are privileged, as
27 they reflect the attorney's recommendations, and the attorney's suggested edits to the
28 letter are privileged for the same reason. The Court cannot conclude that the attorney

1 was merely performing a business function. Communications with an agency regarding
2 studies of Bard products certainly could have legal implications, and review by counsel
3 of such communications would clearly involve potential legal issues.

4 The Court denies Plaintiffs' motion to compel production of Category 4
5 documents.

6 **F. Category 5.**

7 Category five involves "[e]ntries where both the author and the recipient are non-
8 lawyers and an attorney was merely copied on the communication." Doc. 1476-3 at 3.
9 Arizona's corporate attorney-client privilege law protects communications made for the
10 purpose of providing legal advice or information in order to provide legal advice. A.R.S.
11 § 12-2234(B).

12 Four of the five communications – Log 2, Control 859; Log 2, Control 816; Log 3,
13 Control 3987; and Log 3, Control 3161 – involve communications where a lawyer is
14 involved primarily for the purpose of rendering legal advice or assistance. The redacted
15 portions of Log 2, Control 859, for example, explicitly reference revisions from
16 discussions with outside products liability counsel. Log 2, Control 816 consists of
17 internal Bard communications about draft materials to be sent to the FDA, with an in-
18 house lawyer as a party to the communications. As the communications provide
19 information to a lawyer for the purpose of obtaining legal advice, they fall within A.R.S.
20 § 12-2234(B)(2). Log 3, Control 3987 is a draft of a communication to a regulator,
21 copied to a lawyer. Log 3, Control 3161 involves communications between Bard's
22 lawyers and BPV personnel regarding a research grant request. These communications
23 are privileged because they involve lawyers in the preparation of documents that have
24 potential legal significance. Involving lawyers in such communications provides them
25 with the information needed to provide legal advice on the issues of legal significance.
26 A.R.S. § 12-2234(B).

27 Log 1, Control 114 is a memo from Dr. Lehmann and Richard Holcomb to Bard's
28 medical director, copied to Donna Passero. As noted above, the Court has previously

1 found that the legal department retained Dr. Lehmann in anticipation of litigation after
 2 Bard received notice of adverse events associated with the Recovery Filter. Doc. 699 at
 3 5. The communication concerns analysis performed by Dr. Lehmann in accordance with
 4 his contract with the legal department, and Dr. Holcomb, another consultant to the legal
 5 department. Indeed, this document is closely related to Log 1, Control 115, discussed
 6 above, and includes some of the same materials. Because Lehman and Holcomb were
 7 agents of Bard in performing this work, and the result was communicated to Bard
 8 attorney Donna Passero, among other Bard personnel, the Court concludes that it is
 9 privileged under the Arizona statute: “any communication is privileged between an
 10 attorney for [an] . . . entity . . . and any . . . agent . . . of the entity . . . [f]or the purpose of
 11 obtaining information in order to provide legal advice to the entity.” A.R.S. § 12-
 12 2234(B)(2).

13 The Court also finds this document protected by the work-product doctrine. Dr.
 14 Lehmann was retained by the Bard legal department in anticipation of litigation.
 15 Doc. 699. Plaintiffs argue that the communication also had a business purpose, but a dual
 16 purpose document is protected if it “would not have been created in substantially similar
 17 form but for the prospect of litigation.” *Richey*, 632 F.3d at 567-68. The Court cannot
 18 conclude that this work would have been done in substantially the same form solely for
 19 business reasons. Nor is the Court persuaded by Plaintiffs’ citation to *Phillips*, 290
 20 F.R.D. at 652-53. The cited pages concern an email on a different subject that did not
 21 include any legal counsel. *Id.*

22 The Court denies Plaintiffs’ motion to compel production of Category 5
 23 documents.

24 **G. Category 6.**

25 This category involves “[e]ntries describing a communication to non-lawyers and
 26 attorneys seeking simultaneous review and comment.” Doc. 1476-3 at 3. Three of the
 27 five examples do not require the Court’s attention. Plaintiffs have withdrawn their
 28 challenge to Log 3, Control 809, Bard has produced Log 6, Control 251, and the Court

1 determined above that Log 2, Control 816 is privileged.

2 The redacted portions of Log 3, Control 175 are privileged. The redacted portions
3 appear in an email from Judith Reinsdorf, one of Bard's in-house lawyers, to several Bard
4 personnel. Ms. Reinsdorf is providing substantive feedback on a plan to assess clinical
5 issues relating to the G2 filter. Ms. Reinsdorf's comments appear to be for the purpose of
6 providing legal advice.

7 The redacted portions of Log 3, Control 2099 are privileged. The redacted
8 portions appear in an email to Gina Dunsmuir, one of Bard's lawyers, and others, and
9 seek comments on draft talking points to Bard's sales force. Communications with sales
10 force, as noted above, can have significant legal implications, as illustrated by Plaintiffs'
11 claim in this case that Bard's sales force made misrepresentations concerning its
12 products. Because the communication solicits input from a lawyer on these issues, it falls
13 within A.R.S. § 12-2234(B).

14 The Court denies Plaintiffs' motion to compel production of Category 6
15 documents.

16 **H. Category 7.**

17 This category involves "[e]ntries that do not describe the author or recipient of the
18 communication, including attachments." Doc. 1476-3 at 3. Two of the five examples
19 do not require the Court's attention. The Court found above that Log 2, Control 403 is
20 privileged, and Bard has produced Log 6, Control 330.

21 Two of the remaining three documents are clearly privileged. Log 3, Control 224
22 contains legal advice of Bard's in-house and outside counsel. Log 6, Control 115
23 involves talking points from Bard's in-house counsel with respect to an earnings call that
24 will address ongoing litigation.

25 The final document, Log 3, Control 3089, is privileged. It involves an email
26 communication among Bard personnel, including both in-house and outside counsel,
27 attaching a draft document. In Category 1b, above, the Court concluded that the final
28 version of the attachment was privileged. The draft attachment is addressed to an in-

1 house Bard lawyer, and others at BPV, and reports on reviews of literature, data bases,
2 and other sources to obtain information regarding risks and complications of particular
3 filters. It also includes a list of known risks. The information contained in the
4 memorandum clearly is of a type that lawyers would consider in advising the company on
5 legal risks, and the Court finds that the memorandum is covered by the attorney-client
6 privilege.

7 The Court denies Plaintiffs' motion to compel production of Category 7
8 documents.

9 **I. Category 8.**

10 This category involves "[e]ntries where a non-party is an author or listed as
11 receiving a copy of the communication so as to have waived any attorney-client privilege
12 or work product." Doc. 1476-3 at 3. Arizona's corporate attorney-client privilege covers
13 "any employee, agent, or member." A.R.S. § 12-2234(B).

14 One of these examples does not require the Court's attention. Bard has already
15 produced Log 2, Control 1220. Plaintiffs object that they cannot verify this assertion
16 because Bard has not provided a bates number for the document. Bard is directed
17 promptly to provide Plaintiffs with the bates number of the unredacted version of Log 2,
18 Control 1220 it produced.

19 The remaining four documents all appear to be privileged. Log 2, Control 502
20 involves legal communications made by paralegals similar to the examples discussed in
21 Category 1a above. The Court concluded that those and similar communications are
22 privileged. Log 3, Control 335 and Log 3, Control 326 both involve Bard's intellectual
23 property counsel and a draft patent application. Log 2, Control 336 passes along
24 information received from Bard's lawyers for litigation purposes. The attorney-client
25 privilege applies to these documents unless it was waived.

26 The presence of consultants does not waive the privilege. As already noted,
27 Arizona's corporate privilege covers communications involving a corporation's "agents."
28 A.R.S. § 12-2234(B). What is more, the Court concludes that the Arizona Supreme

1 Court would likely adopt the “functional equivalent” test adopted by the Ninth Circuit,
2 which provides that consultants who act as the functional equivalent of an employee are
3 treated as an employee for purposes of the attorney-client privilege. *See United States v.*
4 *Graf*, 610 F.3d 1148, 1157-59 (9th Cir. 2010). Bard has provided evidence that both
5 Richard Bliss and John Kaufmann functioned as employees. *See* Doc. 1476-9 at 3, ¶¶ 5,
6 7. Under either the plain terms of A.R.S. § 12-2344(B) or the functional equivalent
7 doctrine, the presence of consultants did not result in waiver of an otherwise privileged
8 document.

9 The Court denies Plaintiffs’ motion to compel as it pertains to Category 8.

10 **IV. Remaining Issues.**

11 The Court expects that the parties will use this ruling as a guide to resolve
12 remaining privilege disputes. The parties shall update the Court as to their progress on
13 privilege issues in their joint submission for the next case management conference. In
14 that submission, the parties shall address whether they believe it would be helpful to
15 appoint a special master to resolve any additional privilege disputes.

16 **IT IS ORDERED** that Plaintiffs’ motion to compel (Doc. 1214) is **granted in**
17 **part** and **denied in part** as set forth above.

18 Dated this 25th day of July, 2016.

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21 

22 _____
23 David G. Campbell
24 United States District Judge
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